Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona, in and for the County of Maricopa and the Arizona Supreme Court

BRIEF FOR RESPONDENTS IN OPPOSITION

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March 21, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1099

PHOENIX NEWSPAPERS, INC., an Arizona corporation
EUGENE C. PULLIAM and ALBERT J. SITTER,
Petitioners,

v.

JULIAN PEAGLER and DODGE CITY MOTORS, INC., an Arizona corporation,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of the State of Arizona, in and for the County of Maricopa and the Arizona Supreme Court

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion below is adequately set forth in the Petition [Petitioners' Appendix A, except that Petitioners failed to note the denial of two prior special actions which are set forth as Appendix A and B herein.]

JURISDICTION

It is the position of Respondents that this State Court libel lawsuit is not in such a posture that this Court should exercise its discretionary jurisdiction and bring this case up for a decision on the merits. The question with respect to jurisdiction is whether a Petition for Certiorari should be permitted in this State Court

action where no final judgment by the State Court exists and where no decision on the entire record has been made by the highest Court of the State of Arizona.

After discovery by Respondents, the Petitioners herein filed a Motion for Summary Judgment primarily alleging in an extensive Memorandum that the Fourteenth Amendment and the First Amendment's freedom of speech provision provided a qualified privilege to libel which justified dismissal of the lawsuit at the summary judgment stage. A response was filed by respondents at the trial level which assumed that the qualified privilege was applicable and then alleged that discovery had shown that the Petitioners had published an untruth which not only was printed in reckless disregard of the truth, but also was printed with knowledge that it was false. Despite the language of the Petition, the trial court did have the Constitutional issues before it and denied the Motion for Summary Judgment based upon the Constitutional qualified protections which have been announced in *Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny.

From that denial, Petitioners initially filed two Petitions for Special Action in the Arizona Supreme Court (the Special Action is Arizona's procedure for utilizing the extraordinary writs). The first Petition (Supreme Court Number 10727) alleged that the trial court abused its discretion and acted arbitrarily in denying the Petitioner, publisher's, Motion for Summary Judgment. The second Petition for Special Action (Supreme Court Number 10728) alleged that the trial court acted arbitrarily and capriciously for the reason that as a matter of law the Amended Complaint failed to state a claim against the Petitioners and therefore the Arizona Supreme Court should direct the entry of summary judgment in favor of Petitioners. These two Petitions were heard on January 4, 1972, before all members of the Arizona Supreme Court. The Court then issued an order declining to accept jurisdiction on both Special Actions (Respondents' Appendix A and B).

Thereafter, Petitioners again filed another Petition for Special Action and again requested that the Arizona Supreme Court direct the entry of summary judgment in favor of Petitioners on the grounds the trial court exceeded its jurisdiction by infringing upon the Petitioners' freedom of speech, press and privacy guaranteed by the First, Fourth and Fourteenth Amendments. This third Special Action relied upon an order that the publisher, EUGENE C. PULLIAM, answer interrogatories concerned with financial worth. The Petitioners alleged that the order requiring production of this information amounted to an abuse of discretion because the trial court should have granted Petitioners' Motion for Summary Judgment.

During the oral argument on this third Special Action, the Arizona Supreme Court was concerned about the manner in which the financial information was to be disclosed. Thereafter, the Arizona Supreme Court again declined to accept the Petition for Extraordinary Relief with one Justice voting to accept (Respondents' Appendix C).

This is the third refusal by the Arizona Supreme Court to entertain a Petition for Extraordinary Relief based upon the trial court's denial of the Petitioners' Motion for Summary Judgment.

Arizona Appellate Courts have specifically held that the denial of a Motion for Summary Judgment is not an order which can be appealed, *Burke v. Gottfried*, 7 Ariz.App. 96, 436 P.2d 488 (1968). Similarly, the Arizona Statute on Appeals, A.R.S. §12-2101, also fails to authorize an appeal from a denial of a Motion for Summary Judgment. A denial of the summary judgment is an interlocutory judgment, *Tucson Telco Federal Credit Union v. Bowser*, 6 Ariz.APP. 10, 429 P.2d 502 (1967); which does not justify review of that decision in the form of an appeal by the Arizona Appellate Court.

As stated by this court, a denial of a Motion for Summary Judgment "is strictly a pretrial order that decides only one thing

— that the case should go to trial." *Switzerland Cheese Assn. v. Horne's Market*, 385 U.S. 25 (1966). It is not a final decision which terminates the litigation in the Arizona Courts. In fact, the trial of the case was scheduled to begin on February 15, 1972, but was delayed by the trial court so Petitioners could have the opportunity to file this Petition.

It has been well established by 28 U.S.C. 1257(C) that a State Court decision must fulfill two essential requirements before this Court entertains jurisdiction. First, the State Court decision must be a final judgment and secondly it must be made by the highest State Court. Neither of these two essential requirements exist in this Petition.

The Judicial Code provides that there be a "final" judgment in the sense that the case is not subject to review or further correction by the State Court. As stated by this Court, "it must be the final word of a final Court." *Market Street Railway Company v. Railroad Commission*, 324 U.S. 548, 551 (1945). It is apparent that the denial of the Motion for Summary Judgment is not a final decision of the merits of this lawsuit. The case has yet to be before a jury or even before the Arizona Courts in the Appellate posture. The trial Judge can reverse his decision at any later stage of the trial process. For example, the trial court's decision could be reversed by entry of a directed verdict or granting a motion notwithstanding the verdict.

Not only is this Petition deficient because of finality, but is also deficient because the Arizona Supreme Court has not rendered a decision on the merits as indicated by its refusal, in three separate instances, to accept jurisdiction to review the merits of the trial court's decision on the Motion for Summary Judment.

The reason for the two jurisdictional requirements in the Judicial Code are quite sound and very applicable to this lawsuit. Issues received by interlocutory review in this Court may be mooted at a later time. Fore example, the Plaintiff may drop the claim or the Plaintiff may lose at trial via a directed verdict or as

a result of a jury decision. In addition, the Defendant may consent to judgment or the Defendant may compromise the claim thereby mooting the issue. Furthermore, the Petitioners here might prevail on the same issues before the State Court, should this claim be appealed after trial.

If a decision may be mooted at some point in the future, it is a waste of time for this Court to allow a review of an interlocutory order. Also, the ultimate disposition of the cause in the State Court would be unnecessarily delayed should this Court accept the Petition for Review. This Court will not have the benefit of reviewing the Constitutional question in the context of a full, factual record if it allows interlocutory review of this State Court decision. The judicial argument has always been that the finality rule is designed to avoid peacemeal review in the Supreme Court. It is inefficient and results in delayed and disrupted justice. This has been amply demonstrated in the *Catlin v. U.S.* case, 324 U.S. 229, 233-34 (1944):

> ". . . scarcely an order is imaginable which does not finally dispose of some particular point arising in the case; but that does not justify a review of such order, until the action itself has been finally disposed of. If every order were final, which finally passes upon some motion made by one or the other of the parties to a cause, it might in some cases require a dozen writs of error to dispose finally of the case." *Cincinatti Street Railway Company v. Snell*, 179 U.S. 395, 397 (1900).

These are some of the reasons why this Court has almost always refused to receive a Petition for Certiorari involving an interlocutory State Court decision.

Petitioners have cited a number of decisions where this Court has permitted interlocutory appeals. Initially, the Petitioners cite the Court to *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). This case is not particularly applicable since it concerns an appeal from a Federal Court case rather than a State Court decision. The other cases cited by Petitioners for interlocutory review involve decisions which give the State Court little oppor-

tunity for further review at a later stage of the proceedings; so in a sense the interlocutory decision is final and separable from the merits of the lawsuit. *Rosenblatt v. American Cyanamide Company*, 382 U.S. 110 (1965); *Mercantile National Bank v. Langdeau*, 371 U.S. 355 (1963); *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963).

In the *Rosenblatt* case, *supra*, the constitutionality of New York's long arm statute was in issue. The Defendant was served in Italy and challenged the New York Court's jurisdiction by filing a Motion to Dismiss. This Court, through Justice Goldberg, observed that there had been no trial prior to the appeal; but also stated that the New York Court's decision on jurisdiction amounted to a "final" decision on that issue, "with no further review of that issue possible in the State Court". 15 L.Ed 39, 42. That situation does not exist in the present case. Furthermore, Justice Goldberg also noted that the decision on jurisdiction was separable from the merits and not enmeshed in the factual controversies of the case, and for this additional reason, he determined that the case was a "final" decision. The denial of a Motion for Summary Judgment in the present case is the one decision which, of necessity, must be concerned with the factual bases of the lawsuit and therefore the citation to Justice Goldberg is inapposite to the issue of this lawsuit. The same reasoning exists in the *Curry* case, *supra;* and the *Langdeau* case, *supra.* Each of these cases concerns interlocutory appeals where the decision was essentially a final decision that required no further review at a later stage of the trial proceeding, and was not enmeshed in the factual merits of the lawsuit. This situation does not exist in the present case for the trial court can reverse and review its decision on the Motion for Summary Judgment at many later stages in the trial of this lawsuit. As indicated previously, the Court can reverse itself by giving a directed verdict at the end of the Plaintiff's case or the Defendants' case or entering a judgment nothwithstanding the verdict following the trial of the matter. For this reason, the

cases cited by Petitioners for review of interlocutory state orders are not appropriate to the facts of this lawsuit.

STATEMENT

The events which gave rise to this libel action arose out of a front page article in the Arizona Republic on Sunday, August 30, 1970. The article was entitled "Better Business Bureau violates trust, ex-employees assert". Although the article did in some respects concern the Better Business Bureau, the main thrust of the article concerned the efforts of the Direct Sellers Association to secure a voter referendum on a Consumer Portection Bill which had been passed by the Arizona Legislature. The Legislation involved the regulation of direct selling of merchandise to the public in their homes. The Direct Sellers Association, a group of businessmen who engage in door-to-door selling, felt that certain portions of the Bill were not in the public interest and formed their association to seek enough voter petitions to have the legislation placed on the ballot by way of referendum and thereby prohibit the legislation from becoming law 90 days after the adjournment of the legislative session.

The Direct Sellers Association had been the subject of almost a daily barrage of articles, beginning on August 16, 1970, in which the newspaper alleged that the organization was misleading the public and acting fraudulently in their attempts to secure signatures in order to place the legislation before the public in the general election scheduled for November 3, 1970.

With this background, the newspaper published the article concerned with this lawsuit on August 30, 1970. The article purported to be concerned with the Better Business Bureau, but, in fact, was another of a series of articles concerned with the allegedly reprehensible conduct of the Direct Sellers Association. It seemed that the manager of the Better Business Bureau, Mr. White, was also a director of the Direct Sellers Association. That relationship provided the basis for connecting the Better Business

Bureau to the Direct Sellers Association. The article in question proceeded to discuss the Better Business Bureau and the Direct Sellers Association, but immediately went into a tangential discussion by quoting a disgruntled ex-employee of the Better Business Bureau who said the Respondent's business was the one business that had the most number of consumer complaints in the Better Business Bureau's files. The article thereafter reiterated the statement that Respondent, auto dealer, was the worst offender in the Better Business Bureau and then sandwiched further discussion about Respondent between comments that the Direct Sellers Association was engaging in misleading, reprehensible and fraudulent practices, thereby making Respondents the most reprehensible of the reprehensibles.

QUESTION PRESENTED

The ultimate question before this Court is whether the trial court was justified in deciding that substantial issues of fact exist under the applicable legal standards and therefore a jury may determine whether the newspaper libeled Respondents.

ARGUMENT

Prior to filing the lawsuit, investigation of the records of the Better Business Bureau showed conclusively that the auto agency did not have the greatest number of complaints on file in the Better Business Bureau and therefore the statement in the newspaper was untrue. On deposition, Mrs. Runser, the disgruntled ex-employee, was asked whether she had ever made the statement quoted in the newspaper. She denied having made the quoted statement to the reporter.

On deposition of the reporter, he stated that Mrs. Runser made the statements that were attributed to her. As stated in *Goldwater v. Ginzburg*, 414 F.2d 324, at 337:

> "One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter statements or observations are altered or taken out of context."

Since Mrs. Runser never made the statement, but yet the author

quotes her as having made the specific statement, a jury should be permitted to decide the reliability of testimony of the reporter and Mrs. Runser. If the jury believes Mrs. Runser, then the writer of the article must have fabricated the conclusion which appeared in the newspaper. It has been stated many times that calculated falsehood is not given Constitutional protection. *St. Amant v. Thompson,* 390 U.S. 727, (1968).

The reporter further indicated that written notes had been made of the conversation with Mrs. Runser, and he referred to the notes when the article was prepared. Deposition of the City Editor revealed that the newspaper had a policy of requiring their employees to save notes, especially when a retraction demand was submitted. In this case, the article was published on a Sunday, August 30, 1970, and Petitioners received a retraction demand on September 11, 1970, pursuant to the provision of A.R.S. 12-653.02. In reply to that demand, the City Editor forwarded a letter on September 14, 1970, indicating that he had specifically reviewed the notes of the reporter. When the reporter was asked to produce the spiral notebook and the notes of the conversation, he stated the notebook had been destroyed.

It must be remembered that the issue before the trial court was whether Respondents have facts to show the untruthfulness of the statement and other facts which tend to show malice as defined in *Times v. Sullivan, supra,* and *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971). Consequently, the decision which is challenged here and the question before the trial court was whether the Respondents made a showing of the kind contemplated by Rule 56 of the Arizona Rules of Civil Procedure that is sufficient to defeat the contention that there is no question of fact of whether the Petitioners entertained serious doubts of the truth or knowingly published an untruth. Rule 56 in Arizona practice as well as Rule 56 in the Federal Rules is designed to protect Petitioners from harrassment of a groundless trial by

requiring Plaintiffs to come forward in response to a Motion for Summary Judgment not with just an allegation of malice, nor with mere contention of what Respondents expect to prove in the way of malice, but with some evidence of the kind of conduct a jury could find under the applicable legal standards.

It is the position of Respondents that the Rule 56 burden has been met at the trial level by showing that Mrs. Runser has denied the statements attributed to her that Respondents had the greatest number of complaints in the Better Business Bureau; and therefore, the reporter had to know the quotes were untrue. In addition, there is an admission by the writer of the article that he did not know the number of complaints prior to the time he had published the article. This latter information was revealed in a transcript of a taped conversation with one of the owners of the newspaper. In a telephone interview prior to publication, the reporter recorded a conversation with the manager of the Better Business Bureau concerning the proposed article. Not once during that taped conversation did the reporter ask whether or not Respondent did have the most number of complaints. In *Mahnke v. Northwest Publications*, 160 N.W.2d 1 (1968), the Minnesota Court concluded that a quoted statement of a priest had no foundation in fact and if a follow-up had been made to verify the facts, it would have been clear that the statement of the priest was untrue. In the *Mahnke* case, as in this case, the trial judge determined that evidence did exist which might justify a jury in finding malice on the part of the Petitioners. The issue of malice is certainly raised by the denial of the quoted person that the statements concerning Respondents were ever made. In addition, the author's notes have been conveniently destroyed, even though the newspaper had a policy of keeping the notes of the publication. The context of the reply to the demand for retraction indicates the notes were in existence after publication and were reviewed following the demand for retraction. Yet, as indicated, the notes have been destroyed. Viewing the submitted materials

and the inferences which might be drawn from them, "in the light most favorable to the party opposing the motion", *U.S. v. Diebold, Inc.*, 369 U.S. 654. (1962), the trial court properly concluded that a trier of fact should have the opportunity to decide whether the Petitioner should be liable in damages to Respondents.

In conclusion, Mr. Peagler and Dodge City Motors, Inc., were caught up in the newspaper's campaign to show the Direct Sellers Association as a fraudulent, misleading and reprehensible organization. The Respondents were the sacrificial lambs that were slaughtered in the newspapers continuous efforts to perpetuate its position that the Direct Sellers Association was the most reprehensible organization to the consuming public. The evidence presented to the trial court and outlined here shows that the Respondents produced evidence under the applicable constitutional guarantees to create a jury question under Rule 56. For this reason, the trial court's denial of the Motion for Summary Judgment was justified by the evidence and it is therefore respectfully submitted that this Court refuse to entertain jurisdiction on this Petition.

CONCLUSION

Based upon the absence of proper jurisdiction and the fact that the decision below is clearly correct, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 22, 1972

Appendix A

Supreme Court

State of Arizona

Phoenix

85007

January 5, 1972

EUGENE C. PULLIAM, Individually, Petitioner, vs. DODGE CITY MOTORS, INC., an Arizona corporation; JULIAN PEAGLER, an individual; GERALD J. STRICK, Judge of the Superior Court of Maricopa County, Arizona, and THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA, Respondents.	Supreme Court No. 10727 Maricopa County No. C-240270

The following action was taken by the Supreme Court of the State of Arizona on January 4, 1972 in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction at this stage of the proceedings without prejudice to the basic issues."

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: Mark Wilmer, Esq., SNELL & WILMER, 400 Security Bldg., Phoenix, Arizona 85004

James F. Henderson, Esq., GUST, ROSENFELD & DIVELBESS, 300 Security Bldg. Phoenix, Arizona 85004

Harry J. Cavanagh, Esq., O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS, 3003 N. Central - Suite 1800, Phoenix, Arizona 85012

Hon. Gerald J. Strick, Judge of Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona 85003

Appendix B

Supreme Court

State of Arizona

Phoenix

85007

January 5, 1972

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and ALBERT J. SITTER, Petitioners, vs. JULIAN PEAGLER, an individual; GERALD J. STRICK, Judge of the Superior Court of Maricopa County, Arizona, and THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA, Respondents.	Supreme Court No. 10728 Pima (Sic) County No. C-240270

The following action was taken by the Supreme Court of the State of Arizona on January 4, 1972 in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction of the Petition for Special Action."

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: Harry J. Cavanagh, Esq., O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH &

BESHEARS, 3003 N. Central - Suite 1800, Phoenix, Arizona 85012

Mark Wilmer, Esq., SNELL & WILMER, 400 Security Bldg. Phoenix, Arizona 85004

James F. Henderson, GUST, ROSENFELD & DIVELBESS, 300 Security Bldg., Phoenix, Arizona 85004

Hon. Gerald J. Strick, Judge of Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona 85003

Appendix C

Supreme Court

State of Arizona

Phoenix

85007

February 2, 1972

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and ALBERT J. SITTER,

Petitioners,

vs.

JULIAN PEAGLER, and DODGE CITY MOTORS, INC., an Arizona corporation; THE HONORABLE GERALD J. STRICK, Judge of the Superior Court of Maricopa County, Arizona, and THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA,

Respondents.

Supreme Court No. 10752

Maricopa County No. C-240270

The Following action was taken by the Supreme Court of the State of Arizona on February 1, 1972 in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction of the Petition for Special Action, with Justice Fred C. Struckmeyer, Jr. voting to accept."

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS, Suite 1800 First Federal Savings Building, Phoenix, Arizona 85012

SNELL & WILMER, 400 Security Building, Phoenix, Arizona 85004

GUST, ROSENFELD & DIVELBESS, 300 Security Building, Phoenix, Arizona 85004

Hon. Gerald J. Strick, Judge of Superior Court, 101 W. W. Jefferson, Phoenix, Arizona 85003